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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TYCO HEALTHCARE GROUP LP d/b/a VNUS MEDICAL TECHNOLOGIES, Plaintiff, v. BIOLITEC, INC., DORNIER MEDTECH AMERICA, INC., and NEW STAR LASERS, INC. d/b/a COOLTOUCH, INC., Defendants.	LEAD CASE NO. C08-03129 MMC CASE NO. C08-03129 MMC **PLAINTIFF'S OPPOSITION TO BIOLITEC'S MOTION FOR SUMMARY JUDGMENT OF NONINFRINGEMENT AND IN THE ALTERNATIVE SUMMARY ADJUDICATION LIMITING DAMAGES** **[REDACTED]** Date: July 30, 2010 Time: 9:00 a.m. Judge: Hon. Maxine M. Chesney
TYCO HEALTHCARE GROUP LP d/b/a VNUS MEDICAL TECHNOLOGIES, Plaintiff, v. TOTAL VEIN SOLUTIONS, LLC d/b/a TOTAL VEIN SYSTEMS, Defendant.	CASE NO. C08-04234 MMC (consolidated with C08-03129 MMC)

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I. PRELIMINARY STATEMENT

Defendant biolitec, Inc. moves for summary judgment of no contributory infringement or inducement primarily on the grounds that physicians allegedly do not compress the vein when using biolitec's products to perform endovenous ablation. biolitec does so despite significant and unrebuttable evidence demonstrating that (1) compression using tumescent anesthesia is a vital step in successful endovenous ablation procedures and is the established standard of care, REDACTED

Indeed, the record shows that REDACTED

biolitec now tries to deny the necessity of the compression REDACTED

Instead of addressing this record directly, biolitec first asks the Court to ignore expert opinion and testimony that the accused products have no substantial noninfringing uses and that physicians performing nonexperimental endovenous ablation procedures always compress the vein. Next, it asks the Court to find as a matter of law that certain aberrant procedures—[REDACTED REDACTED]—constitute substantial noninfringing uses. Finally, biolitec asks the Court to believe that it does not intend for physicians to use its products consistently with the established standard of care. biolitec cannot, however, avoid the numerous genuine issues of material fact that run throughout its motion. Indeed, the evidence in this case would overwhelmingly support a jury finding of contributory infringement and inducement as well as an award of damages that encompasses all sales of biolitec's endovenous ablation products. Accordingly, biolitec's motion must be denied.

II. STATEMENT OF DISPUTED FACTS

A. *biolitec's Accused Products*

Three years after Plaintiff Tyco Healthcare Group LP d/b/a VNUS Medical Technologies ("VNUS") introduced its Closure® product line commercializing the inventive methods described

in the Patents-in-Suit, biolitec introduced its ELVeS product line—which stands for Endo Laser Vein System—for performing the same procedure but with laser energy. REDACTED

As part of its ELVeS line, biolitec sells laser consoles, laser fibers, and endovenous ablation procedure kits.[2]

biolitec began by selling 810 and 980 nm laser consoles for use in endovenous ablation both directly to physicians REDACTED

After this lawsuit was filed, biolitec began selling 1470 nm laser consoles and fibers for use in endovenous ablation.[6] REDACTED

This REDACTED is confirmed by Dr. Andrews and REDACTED

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[1] *See* Ex. 95 at BIO002762 and BIO002778 (unless otherwise noted, citations to exhibits refer to those attached to the accompanying Declaration of David J. Lisson).

[2] *See* Ex. 96 at 2-4.

[3] REDACTED

[4] *See* Ex. 31 (Andrews Depo. at 31:11-19).

[5] *See* Ex. 99 at VNUS_150334.

[6] *See* Exs. 100 at 10; 96 at 2-4.

[7] REDACTED

both of whom agreed that the 1470 nm laser and fibers have no use other than endovenous ablation procedures.[8]

B. *Infringement When Practicing Endovenous Ablation with biolitec Products*

The Patents-in-Suit describe compressing the vein prior to the application of energy in some form and, as Dr. Andrews testified and explained in detail in his expert report, physicians who perform effective, nonexperimental endovenous ablation always compress the vein by applying tumescent anesthesia prior to the application of energy.[9] The established and standard procedure followed by virtually every single practitioner using biolitec's products for endovenous ablation therefore infringes the Patents-In-Suit.[10] Indeed, biolitec's infringement expert, Dr. Do, admitted that using tumescent anesthesia is the accepted procedure and that "if someone were to use the tumescent technique, then that may indeed infringe."[11] Multiple physicians, including REDACTED REDACTED a former biolitec customer who trains for one of its codefendants, have similarly testified that tumescent anesthesia compresses the vein when performing endovenous ablation even if they may not subjectively be seeking compression.[12]

The evidence demonstrates REDACTED

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[8] *See* Exs. 41 at 75, 83 (opining that "[i]t is my opinion that biolitec's 1470 nm laser console is not suitable for any substantial non-infringing use"); REDACTED

[9] *See* Ex. 31 (Andrews Depo. at 137:14-18) ("[T]he standard way of performing endovenous ablation is to introduce a thermal device through a sheath positioned with ultrasound guidance followed by the infusion of compressive tumescent anesthesia.").

[10] *See id.* at 136:10-13 ("[E]very person I personally know or have ever spoken to about endovenous laser ablation does it in a way that would infringe.") and 137:6-11 ("[E]very person I've spoken to about vein ablation, regardless of what device he or she may use, does perform it in the same way, so that if they did use the biolitec product, they would be using it in an infringing way."); and Ex. 41 at 10 and 73.

[11] *See* Ex. 103 (Do Depo. at 51:17-52:6, 63:19-21).

[12] *See* REDACTED 52 (Bardwil Depo. at 25:1-10; 39:19-40:) ("A: . . . [Y]ou'll see the vein is a circle: and that circle appears to become small."); and REDACTED

REDACTED

REDACTED

but it distributed instructions for use ("IFUs") instructing physicians to administer it. biolitec's IFUs stated that phyicians performing endovenous ablation with biolitec products should administer 100 to 150 ml of perivenous anesthesia.[15] Dr. Andrews has opined that administering this volume into the saphenous compartment, as physicians would understand the term "perivenous" to mean in connection with endovenous ablation, will cause compression of the vein.[16] This conclusion was confirmed by REDACTED and by published studies using biolitec's products.[18] To the extent this volume would not be sufficient to compress the vein in any abnormal patient, physicians performing the endovenous ablation procedure will use additional tumescent anesthesia if necessary to compress the vein, consistent with the established standard of care.[19]

C. ***biolitec's*** REDACTED

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[13] *See* Ex. 104 at BIO001803 (emphasis added).

[14] REDACTED

[15] *See* Ex. 105 at BIO004975-76.

[16] *See* Ex. 41 at 27-28.

[17] REDACTED

[18] *See* Exs. 106 at VNUS_044898 (concluding that 60 to 120 ml of lidocaine compressed the greater saphenous vein during endovenous ablation procedures); and 81 at VNUS2_083402-03.

[19] *See* Ex. 41 at 27-29, 31-35.

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Second, biolitec attempted to develop a femoral nerve block technique, without the use of tumescent anesthesia, but has not obtained FDA 510(k) approval to promote it. It also has not sent a single physician to be trained on the femoral nerve block procedure by Dr. Do, its nominal trainer, nor has it identified a single doctor other than Dr. Do who is currently using the technique.[26] Indeed, the evidence shows that Dr. Do's technique is unlikely to be successful for multiple reasons including the same reason that biolitec's first design around failed: a successful procedure requires tumescent anesthesia to compress and insulate the vein.[27]

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[20] REDACTED

[21] *See* Ex. 107 at BIO016002.

[22] REDACTED

[23] *See* Ex. 81 at VNUS2_083404.

[24] REDACTED

[25] REDACTED

[26] *See* Ex. 103 (Do Depo. at 46:21-24) ("Q: And have you actually trained people to do endovenous ablation using the femoral nerve block? A. No I have not."), and 48:20-49:10 (Dr. Do. does not know of one person other than himself performing the femoral nerve block procedure in the United States)). REDACTED REDACTED

[27] *See* Exs. 41 at 34-35; and 31 (Andrews Depo. at 140:17-141:14) (explaining that Dr. Do's nerve block procedures may not be successful because he uses far less energy than the standard). REDACTED and 103 (Do Depo. at 110:24-112:3) (admitting that the nerve block results in "some loss of motor strength").

III. ARGUMENT

Summary judgment is inappropriate where there are genuine issues as to any material fact. FED. R. CIV. P. 56(c); *Ricoh Co., Ltd. v. Quanta Computer Inc.*, 550 F.3d 1325, 1331 (Fed. Cir. 2008). The record must be viewed in the light most favorable to the party opposing the motion with all doubts resolved in its favor. *Masson v. New Yorker Magazine*, 501 U.S. 496, 520 (1991); *Ricoh*, 550 F.3d at 1331. Moreover, because infringement is an issue of fact, "a district court must approach a motion for summary judgment of infringement or noninfringement with a care proportioned to the likelihood of its being inappropriate." *Sandisk Corp. v. Lexar Media*, 91 F. Supp. 2d 1327, 1331 (N.D. Cal. 2000) (quoting *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985)). biolitec's motion raises numerous issues of material fact including (1) whether any alleged noninfringing uses of its products are substantial, and (2) its intent to induce infringement. Moreover, it rests on a faulty understanding of the law of inducement and damages. Accordingly, the motion must be denied.

IV. THERE ARE GENUINE ISSUES OF MATERIAL FACT CONCERNING BIOLITEC'S CONTRIBUTORY INFRINGEMENT

A. *Applicable Legal Principles*

A noninfringing use of an accused product is a defense to contributory infringement only if the noninfringing use is *substantial*. 35 U.S.C. § 271(c).[28] Unusual, far-fetched, illusory, impractical, occasional, aberrant or experimental uses are not substantial noninfringing uses. *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 851 (Fed. Cir. 2010); *see also Hoffmann-La Roche, Inc. v. Promega Corp.*, 33 U.S.P.Q.2d 1641, 1648 (N.D. Cal. 1994) ("*[O]ccasional* aberrant use of a product does not make that use 'substantial.'") (emphasis in original); *Mass Engineered Design, Inc. v. Ergotron, Inc.*, 633 F. Supp. 2d 361, 377-78 (E.D. Tex. 2009) (holding that the jury could have concluded "that the 'noninfringing' use was occasional rather than substantial"). Summary judgment of no contributory infringement is inappropriate if evidence shows that the noninfringing use is inferior to the patented use. *Pickholtz v. Rainbow Techs., Inc.*, 260 F. Supp. 2d 980, 988-89

[28] Because the contributory infringement portion of biolitec's motion is limited to the issue of substantial noninfringing use, this opposition will only address that issue.

(N.D. Cal. 2003). A party is not entitled to summary judgment where, as here, a reasonable jury could find biolitec liable for contributory infringement. *See Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311, 1326 (Fed. Cir. 2004) (vacating summary judgment of no contributory infringement even though plaintiff's evidentiary showing was "sparse and not altogether clear").

B. Abundant Evidence Demonstrates That There Are No Substantial NonInfringing Uses for biolitec's Endovenous Ablation Products

While biolitec concedes that VNUS has evidence establishing that biolitec's ELVeS products lack substantial noninfringing uses, it asks the Court to improperly discount that evidence and draw weakly supported conclusions in its favor. *See* biolitec Br. at 7-8. More fundamentally, biolitec wholly fails to address whether the allegedly noninfringing uses it proposes are *substantial* as opposed to occasional or experimental. This omission is fatal given VNUS's evidence. *See i4i Ltd. P'ship*, 598 F.3d at 850-51 (finding contributory infringement despite admission that products could be used in noninfringing ways because substantial noninfringing uses "cannot be evaluated in a vacuum" and the noninfringing uses were not "practical or worthwhile" for the intended market). At the very least, the evidence raises numerous material issues of fact regarding any purported substantial noninfringing uses and mandates that this case proceed to trial.

First, Dr. Andrews unambiguously concluded that biolitec's products do not have substantial noninfringing uses after considering and rejecting the arguments advanced in biolitec's brief.[29] Dr. Andrews specifically addressed biolitec's argument that its customers do not compress the vein.[30] biolitec's request that the Court ignore Dr. Andrews's opinions, which were based on peer-reviewed studies, REDACTED and his own extensive experience, is impermissible in a motion for summary judgment where the evidence must be viewed in the light most favorable to VNUS. *Masson*, 501 U.S. at 520.[31]

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[29] *See* Ex. 41 at 68-69, 75-77, and 82-83 (concluding that biolitec's 1470 nm laser console, laser fibers, and ELVeS procedure kits "do not have any substantial non-infringing uses").

[30] *See id.* at 25-35; Ex. 31 (Andrews Depo. at 136:6-138:8).

[31] biolitec relies heavily on the suggestion that Dr. Andrews did not specifically recall talking about biolitec's products with other physicians, for example, REDACTED REDACTED

Second, significant evidence supports Dr. Andrews's opinion, including testimony from REDACTED REDACTED acknowledging compression of the vein during endovenous ablation.[32] A number of studies describing the use of biolitec's products have confirmed that volumes of tumescent anesthesia well within the range recommended in biolitec's IFUs and now purportedly noninfringing—60 to 120 ml in one study and an average of 128 ml in the other—compress the vein.[33] In fact, such compression is important for effective procedures.[34] Thus, a study paid for by biolitec to examine the use of its 1470 nm laser concluded that "vein compression with the tumescent technique augments closure,"[35] while another study examining the 980 nm console concluded that "tumescent anesthesia is very important to reduce the lumen of the treated veins, maintain the tip of the fiber close to the endothelium and reduce the diameter of the vein."[36] Summary judgment of a substantial noninfringing use is all the more inappropriate when, as here, the alleged noninfringing use is inferior. *See Pickholtz*, 260 F. Supp. 2d at 988-89.

Third, as described above, the evidence shows that REDACTED

i4i Ltd. P'ship, 598 F.3d at 851; *Hoffmann-La Roche*, 33 U.S.P.Q.2d at 1648.

Finally, biolitec asserts that its 810 and 980 nm lasers and laser fibers have substantial uses

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[32] *See, supra*, n. 12.

[33] *See* Exs. 106 at VNUS_044898; and 81 at VNUS2_083402-03. These volumes are well within those recommended in biolitec's IFUs and those biolitec relies upon as noninfringing uses. *See* Ex. 105 at BIO004975-76 and biolitec Br. at 8.

[34] *See* Exs. 110 at BIO010271 (describing compression as necessary to "maximize circumferential energy transfer to the vein wall"); and 111 at BIO010278 (describing the benefit of using tumescent anesthesia to compress the vein and maximize energy transfer).

[35] *See* Ex. 81 at VNUS2_083404.

[36] *See* Exs. 112 at BIO045735.

[37] *See*, *supra*, fns. 13-14 and accompanying text.

[38] *See*, *supra*, fns. 20-27 and accompanying text; Exs. 41 at 33-35; and 81.

other than endovenous ablation. *See* biolitec Br. at 10. Yet, as described in detail in Dr. Andrews's report, REDACTED Moreover, biolitec sold those lasers and fibers to physicians who only use them for endovenous ablation.[40] Thus, summary judgment is improper because biolitec fails to establish any substantial noninfringing uses for the lasers and fibers it has actually sold. *See Medtronic Xomed, Inc. v. Gyrus ENT LLC*, 440 F. Supp. 2d 1300, 1311-13 (M.D. Fla. 2006) (denying summary judgment because accused products were specifically designed, marketed and sold for use in infringing procedures); *Hoffmann-La Roche, Inc.*, 33 U.S.P.Q.2d at 1648-49; (no summary judgment where kit was optimized for an infringing use); *i4i Ltd. P'ship*, 598 F.3d at 851 (holding that the intended market may be considered when assessing whether a noninfringing use is substantial).

Notably, this case is very similar to *Diomed, Inc. v. AngioDynamics, Inc.*, 450 F. Supp. 2d 130, 152 (D. Mass. 2006), which also dealt with endovenous ablation and a similar issue regarding vein compression. While the court acknowledged that the defendants offered evidence that their products could theoretically be used in a noninfringing manner, the evidence was counterbalanced by facts implying infringement. The court concluded that "[g]iven the genuine dispute concerning the extent to which defendants' products rely upon physical contact between a laser tip and blood vessel wall, summary judgment on the issue of contributory infringement would be premature." *Id.* The same result should hold here.

V. THERE ARE GENUINE ISSUES OF MATERIAL FACT CONCERNING BIOLITEC'S INDUCEMENT OF INFRINGEMENT

A. Applicable Legal Principles

The requisite intent to induce infringement exists so long as the alleged infringer "knew or should have known his actions would induce actual infringements." *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1304 (Fed. Cir. 2006) (en banc). Intent to induce infringement is a factual

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[40] *See* Ex. 100 at 10.

determination particularly within the province of the trier of fact and may be inferred from all of the circumstances. *Water Techs. Corp. v. Calco, Ltd.*, 850 F.2d 660, 669 (Fed. Cir. 1988).

To prevail on inducement, VNUS need only show that biolitec "is aware of the patent, knows or should have known that the encouraged acts constitute infringement of the patent, and has an intent to cause the encouraged acts." *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 698 (Fed Cir. 2008). Such infringement occurs regardless of whether physicians subjectively intend to compress the vein. *See Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570 n.2 (Fed. Cir. 1996). It is likewise immaterial whether biolitec intends for physicians to compress the vein or even considers compression to be important. *See* Defs.' Mot. at 12-13; *Aventis Pharm., Inc. v. Barr Labs., Inc.*, 411 F. Supp. 2d 490, 518 (D.N.J. 2006), *aff'd*, 208 F.App'x. 842 (Fed. Cir. 2006) ("The Court determines what is affirmative or purposeful from an objective viewpoint, not by undertaking an analysis of whether the accused inducer subjectively experienced a purpose or an intent that the steps affirm. Put more simply, if one could escape liability for inducing infringement just by saying, 'I never wanted anyone to infringe,' this would eviscerate the statutory protection."). Accordingly, whether biolitec or physicians want compression of the vein is irrelevant so long as physicians performing endvoenous ablation do, in fact, compress the vein and biolitec encourages those procedures with the knowledge that they do so.

B. Abundant Evidence Establishes biolitec's Intent to Induce Infringement

The evidence detailed above clearly raises genuine issues of material fact regarding biolitec's intent to induce infringement. Through its IFUs and other culpable conduct, biolitec intentionally encourages physicians to perform acts constituting infringement: endovenous ablation procedures in which administering anesthesia compresses the vein being treated.[41] VNUS's evidence shows that that administering 100 to 150 ml of anesthesia perivenously as directed by biolitec's IFUs compresses the vein, that compression of the vein is a necessary component of the established standard of care, and that biolitec distributed its products and IFUs despite its awareness of the compression caused by tumescent anesthesia and of the VNUS patents.[42] This evidence

[41] *See, e.g.*, Ex. 41 at 25-29 and tabs E-F.

[42] *See, supra*, fns. 9-19 and accompanying text.

directly contradicts biolitec's suggestion that compression of the vein during its procedure constitutes an "off-label" use, *see* biolitec Br. at 12-13, and, instead, shows biolitec's "affirmative intent that the product be used to infringe." *DSU*, 471 F.3d at 1305; *see also Medtronic, Inc. v. AGA Med. Corp.*, No. C-07-0567 MMC, 2009 U.S. Dist. LEXIS 36168, at *5-8 (N.D. Cal. Apr. 28, 2009) (finding triable issue as to whether defendant induced physicians to infringe where defendant's IFUs instructed the practice of the patented methods). Moreover, regardless of whether biolitec's IFUs instruct compression, summary judgment is improper since specific intent may be inferred from the fact that **REDACTED**

Finally, far from evidencing a lack of intent, biolitec's **REDACTED** **REDACTED** and continued sales of the accused products support a finding of inducement. *See Astrazeneca LP v. Apotex, Inc.*, 623 F. Supp. 2d 615, 618 (D.N.J. 2009) ("[W]hatever 'good' intent Apotex may have shown in trying to work around the infringement issue was overcome when Apotex moved forward with an infringing label.").[44]

These facts distinguish this case from those relied upon by biolitec, which presented no evidence of culpable conduct or intent.[45] Unlike in *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1318, 1329 (Fed. Cir. 2009), for example, where the instructions taught a substantial use the defendant "could have reasonably believed was non-infringing" and another use that was noninfringing, here biolitec knew its instructions taught a "tumescent" procedure and accordingly would result in infringing use.[46] *See i4i*, 598 F.3d at 852 (distinguishing *Vita-Mix* and upholding

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[44] **REDACTED**

[45] *See ICN Pharms., Inc. v. Geneva Pharms. Tech. Corp.*, 272 F. Supp. 2d 1028, 1049-50 (C.D. Cal. 2003) (labeling instructions indisputably did not encourage an infringing use); *Gammino v. Cellco P'ship*, 527 F. Supp. 2d 395, 397 (E.D. Pa. 2007) (defendant merely purchased infringing features from other sources without knowledge as to "what processes, methods, or apparatuses" were employed to provide those features); *Boston Scientific Corp. v. Johnson & Johnson*, 534 F. Supp. 2d 1062, 1079 (N.D. Cal. 2007) (defendant did not instruct the patented process or even know it was being practiced by the direct infringer).

[46] *See, supra*, fns. 9-19 and accompanying text.

inducement verdict on these grounds). REDACTED

Accordingly, biolitec's motion for summary judgment on inducement must be denied.

VI. LIMITING DAMAGES ON VNUS'S INDUCEMENT CLAIMS WOULD BE PREMATURE

biolitec's request for limitation of damages on VNUS's inducement claims to specific, proven instances of direct infringement is both premature and legally unfounded, and should be denied. At this stage, the issues before the Court are whether biolitec can establish that it is not liable for contributory infringement or inducing infringement as a matter of law. The proper calculation of VNUS's damages is for the fact-finder to determine after a finding of liability on either ground.

To establish biolitec's liability for indirect infringement, VNUS may identify individual acts of direct infringement or an entire category of infringers. *See, e.g., Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1364-65 (Fed. Cir. 2004) (circumstantial evidence that it would be malpractice for physicians not to perform the infringing step permitted inference that physicians directly infringe); *Rackable Sys., Inc. v. Super Micro Computer, Inc.*, No. C 05-3561 PJH, 2007 U.S. Dist. LEXIS 33824, at *27-28 (N.D. Cal. Apr. 25, 2007). As previously discussed, extensive evidence supports a finding that compression is necessary for safe and effective EVA, and therefore that the class of biolitec's ELVeS customers necessarily use the accused products in an infringing manner.[48] *See, e.g., Metabolite Labs.*, 370 F.3d at 1364-65 (Fed. Cir. 2004). The existence of any insubstantial noninfringing use, such as Dr. Do's femoral nerve block procedure, cannot overcome VNUS's ability to establish this class of infringers at trial. *See Mass Engineered Design*, 633 F. Supp. 2d at 378 (rejecting defendant's argument that any device with a

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[47] REDACTED

[48] *See, supra*, fns. 9-19 and accompanying text.

noninfringing configuration cannot necessarily infringe).[49]

Once again, this situation is substantially identical to that considered in *Diomed*. Like biolitec, the *Diomed* defendants sought to limit damages to particular acts of infringement. *Diomed*, 450 F. Supp. 2d. at 151. The court held that the damages claim could not be resolved on summary judgment due to the existence of genuine issues of material fact regarding whether the class of defendants' customers infringed. *Id.* at 151-52. Notably, VNUS's arguments and evidence concerning the necessity of compression are virtually indistinguishable from the arguments and evidence submitted by Diomed, who was represented by biolitec's counsel in this case. *Id.* In contrast, the cases upon which biolitec relies are wholly inapposite. See biolitec Br. at 14-15.[50] In sum, biolitec's request for summary adjudication of damages, based on evidence of aberrant, insubstantial uses that defy the standard of care and intended use of the accused products, invites legal error and should be denied.

VII. CONCLUSION

In light of the numerous genuine issues of material fact, VNUS respectfully requests that this Court deny biolitec's Motion for Summary Judgment of Noninfringement and in the Alternative for Summary Adjudication Limiting Damages.

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[49] biolitec implicitly concedes this point by not seeking to limit VNUS's damages to specific instances of direct infringement in the event that VNUS prevails on its contributory infringement claim.

[50] *See ACCO Brands, Inc. v. ABA Locks Mfg. Co.*, 501 F.3d 1307, 1313 (Fed. Cir. 2007) (addressing the proof of liability, not damages, where defendant's instructions instructed a noninfringing use and the record was devoid of evidence of actual users having used the product in an infringing manner); *Standard Havens Prods., Inc. v. Gencor Indus. Inc.*, 953 F.2d 1360, 1374 (Fed. Cir. 1991) (denying damages for products that the patentee either did not accuse of infringement or that were sold in a foreign country); *SRI Int'l. Inc. v. Internet Security Sys., Inc.*, 647 F. Supp. 2d 323, 343-44 (D. Del. 2009) (granting JMOL where there was no affirmative evidence that customers infringed or that the defendant provided instructions for use in an infringing manner); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1323-24, 1334-35 (Fed. Cir. 2009) (vacating damages award in view of substantial infirmities, including absence of any evidence regarding how often consumers used the infringing feature, while rejecting defendant's argument that method claims require damages to be limited to the number of instances of actual infringing use); *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 576 F.3d 1348 (Fed. Cir. 2009) (neither the class of infringers nor indirect infringement were at issue).

Dated: July 9, 2010

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